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For Immediate Release –

ARE YOU WILLING TO “SELL YOUR SOUL” FOR SOME QUICK CASH?

Many if not all of you have received notices stating the following:

In November 2012, the federal district court overseeing In re Payment Card Interchange Fee and Merchant Discount Antitrust Litigation (MDL 1720), the merchant class action interchange litigation against Visa and other defendants, preliminarily approved a class settlement agreement (“settlement”) that resolves antitrust claims involving Visa’s interchange and merchant acceptance rules in the U.S. and its territories. The court’s preliminary approval order triggered Visa’s obligation to implement several revisions to its Visa International Operating Regulations acceptance rules applicable to transactions at merchants in the U.S. and U.S. territories¹ (“U.S. merchants”).

These rule changes will take effect January 27, 2013. The full text of the revised rules will be available mid-January, and will be published in the next release of the Visa International Operating Regulations, in April 2013. As required by the settlement, acquirers must provide their merchants in the U.S. and U.S. territories with written notification of the changes to Visa’s rules. An electronic version of the merchant notification and additional information is available at www.visa.com/merchantsurcharging.





These notices can be a bit ambiguous and the research to discern what the ramifications of this class action lawsuit, daunting.

In our tradition of keeping Incom’s valued clients one step ahead of the bankcard game, this document provides the details of this class action lawsuit along with Incom Direct’s recommendations. Feel free to contact our office directly if you would like to discuss this or any other issue or how it will financially impact your businesses.

On June 22, 2005, Photos Etc. Corporation, Traditions Ltd., CHS Inc., and Other plaintiffs filed a class action complaint in *Photos Etc. Corp., et al. v. Visa U.S.A. Inc., ET al.*, No. 05-CV-01007 (D. Conn.), alleging, among other things, that Defendants unlawfully fixed Interchange fees and engaged in other conduct in violation of Section 1 of the Sherman Act (15U.S.C. § 1, *et seq.*);

After more than 50 million pages of documents and eight years, Visa and MasterCard offered a settlement agreement in November – the court has sanctioned the agreement; however merchants can decide whether they want to “opt in” to this agreement.

On its face, this would appear as a legitimate settlement offer --

-  Visa and MasterCard will refund 7 Billion dollars to be shared amongst participating merchants.
-  Merchants can now “surcharge” credit card transactions¹
-  Participating merchants will receive a temporary (10 months) rate discount of .10%
-  Participation in this settlement forever prohibits and participating merchant to bring or enjoin in any litigation against Visa and/or MasterCard.

Incom's recommendations:

Any current or prospective merchant with Incom must realize the gravity of this surcharge, and more importantly, the actual settlement. When a merchant agrees to participate in the surcharge they, by action, are now involved with the other aspects of the settlement.

Doing so can limit their future rights if the card brands decide to amend this settlement decision: No recourse against card brands for their future actions. In other words, the card brands can act with impunity with no recourse available to the merchant.

Furthermore, consider that Visa and MasterCard are UNREGULATED and have the sole ability to raise rates and implement fees at will. The Durbin legislation was designed to give financial relieve specifically to debit card transactions, and for a while, it did. Yet when Visa and MasterCard convened the following April, they quickly recouped those losses and then some by implementing a Fixed Acquirer Network Fee, and a Tax Identification Number Fee. Both of these fees have no legitimate rhyme or reason relating to actual transaction cost – In fact, Visas broadcast prior to the implementation of those fees was bone chilling, and clearly shows not only the power Visa and MasterCard have over this portion of the economy, but also the impunity they will act within thwarting the Federal Governments attempts to curb this monopoly.

That Visa Broadcast in part stated, “Debit regulation in the U.S. has altered the competitive landscape. To compete in the new environment, Visa has revised its business strategy. As part of this revised strategy, Visa’s intention is to change its fee structure in a way that could lower acceptance costs to the vast majority of U.S. merchants, while allowing for continued investments in its secure, reliable network. These changes, announced below, are designed to benefit merchants, financial institutions and Visa and are fully incremental to the \$8 billion merchants received from debit price controls.”

¹ There are 10 States that have prohibited “surcharges” – see “*Incom's Recommendations*” for details

You can rest assured that Visa and MasterCard will quickly recoup the cost of this litigation and settlement through future rate increases and new fees – Participating merchants will be rendered mute by agreeing to this settlement at this time.

Consider that surcharges on credit card transactions can be a deterrent to customers shopping with your site. Succumbing to the lure of quick savings now it is not worth the long term detraction on your business, i.e. loss of rights, customer uproar surrounding the surcharge, etc. It is also unnecessary as Incom clients have already been advised of their average cost per ticket so that they can build it back into their products and services – ultimately absorbing this significant line item expense with accurate pricing. If you need to know your average ticket and cost per transaction so that you can set pricing, please contact Incom immediately.

With that said, Incom strongly recommends that a merchant should not partake in this surcharge and its various aspects. If a merchant stills decides that they want to participate and charge a surcharge, use the following information as a basis to discuss with the merchant.

Surcharge Information:

Stemming from the 2012 settlement (that started in 2005) for Visa and MasterCard granted merchants the ability to charge a percent or dollar amount to credit card transactions. This amount is a surcharge designed to offset the Interchange costs a merchant incurs for a transaction. Historically, both card brands have not allowed such a thing in their operating guidelines.

As such, a merchant now must look at several factors and consider, “will I or won’t I add a surcharge to my credit card transactions?” If so,

1. How will my customer base react?
2. How will I disclose all of this to my customers?
3. What will my competitors do?

If a merchant decides to implement a surcharge on credit card transactions the following points are necessary to review:

1. **Is the surcharge even permitted in my state?** Even though this portion of the settlement can affect the 50 US states and territories, there are still states that at their level prohibit (i.e. against the law) to add a surcharge. These states are (as of now):

- a. California
- b. Colorado
- c. Connecticut
- d. Florida
- e. Kansas
- f. Maine
- g. Massachusetts
- h. New York
- i. Oklahoma
- j. Texas

2. **When can the surcharge take effect?** Is there any notification necessary for starting a surcharge?

- a. Starting January 27th, 2013 the ability to begin assessing a surcharge on credit card transactions begins.
- b. Any merchant that decides to start a surcharge must notify Visa (via their website) and MasterCard (via an email) 30 days prior to the date they wish to begin charging the surcharge. Multiple locations/businesses may have additional information that will be necessary to provide.

3. **What can I surcharge?** Only credit transactions in the US and US territories are eligible for a surcharge. Debit and pre paid transactions CANNOT be surcharged. Also, a “level playing field” limitation is in place, meaning that a surcharge must be consistent across card brands and/or card types.

4. **How much can I surcharge?** The amount assessed must be less than the cost of acceptance for the credit card. Merchant category code (MCC), card type (reward, corporate, etc.), and and/or card brand play a role in the surcharge amount. No minimum has been established, but the maximum of 4% has been set as a maximum. In the event the cost of acceptance is higher than 4%, it cannot exceed the 4% amount. Also, a dollar amount can be used as an option to the percentage surcharge amount. The merchant is responsible for deciding this amount. If they are unsure, they can reference Visa/MasterCard for Card brand/type specific amounts.

5. **What must be disclosed? Where should it be disclosed?** The surcharge amount must be fully disclosed to the customer prior to the completion of the transaction. Disclosure must be posted in customer facing locations, i.e. point of entry, point of sale, website, etc.). These disclosures must list the surcharge in detail. Also, it must be itemized on the customer’s receipt, as a separate line item.

Some important points to know with the backend relationships:

1. They are following the guidance of the card brands and act based on their regulations/rules for surcharging. The backend will have no idea if a merchant has registered with a card brand, since that would take place at the card brand level. The backend is also not restricting this surcharge within their system in anyway.
2. Implementation for this surcharge at the backend is still in limbo (as of this summary’s writing). Plans to move ahead with programming, system modifications, etc., tend to point to Visa/MasterCard updating their operational guides. This is planned for April 19, 2013 for Visa; MasterCard has no forecasted date.
3. Standalone programming updates will come from an undecided party, most likely the backend. This will most likely happen when they decide to update their systems (see previous point).
4. POS/standalone software must have their systems/software programming modified to accommodate the itemization function of this surcharge change. Currently this requirement is independent of the backend modifications and no timeline for execution is known (as of this summary’s writing).

For additional information please follow these links:

http://usa.visa.com/personal/using_visas_checkout_fees/index.html

http://usa.visa.com/merchants/operations/surcharging.html?ep=v_sym_merchantsurcharging

<http://www.mastercard.us/merchants/support/surcharge-rules.html>

http://www.bankrate.com/financing/credit-cards/checkout-fees-take-effect/?ec_id=cmct_comm_finhp

<http://consumerist.com/2012/07/13/visa-mastercard-agree-to-let-merchants-charge-extra-to-credit-card-customers/>